

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

<b>NEW YORK PARTY SHUTTLE,</b>	§	
<b>LLC, d/b/a ONBOARD TOURS,</b>	§	
<b>WASHINGTON DC PARTY</b>	§	
<b>SHUTTLE, LLC, d/b/a ONBOARD</b>	§	<b>Case No. 02-CA-073340</b>
<b>TOURS, ONBOARD LAS VEGAS</b>	§	
<b>TOURS, LLC, d/b/a ONBOARD</b>	§	
<b>TOURS, NYC GUIDED TOURS,</b>	§	
<b>LLC, and PARTY SHUTTLE</b>	§	
<b>TOURS, LLC,</b>	§	
<b>and</b>	§	
<b>FRED PFLANTZER, AN</b>	§	
<b>INDIVIDUAL</b>	§	

**RESPONDENTS' POST HEARING BRIEF**

New York Party Shuttle (“NYPS”), Washington DC Party Shuttle, LLC (“DCPS”), OnBoard Las Vegas Tours, LLC (“OBLVT”), NYC Guided Tours, LLC (“NYCGT”), and Party Shuttle Tours, LLC (“PST”), collectively “Respondents,” file and serve this Post-Hearing Brief, and would show the Board as follows:

**INTRODUCTION**

1. A Compliance Specification Hearing was held in this matter in May and June of 2018. Respondents file this Post-Hearing Brief to organize the evidence and issues, so that a proper decision may be rendered.

2. There are a number of themes that undercut the credibility of the General Counsel’s case. When considered individually, each reduces the amount of back pay that could reasonably said to be owed to Mr. Pflantzer by NYPS. When considered in the aggregate, they show that Mr. Pflantzer has little or no credibility because he has

consistently demonstrated his willingness to swear under oath to facts that are not true and to change his story and position to benefit his claim.

- Mr. Pflantzer was not a reliable or trustworthy employee. Pflantzer had at least 10 employers from 2011 to 2018. Edwin Jorge had one. Pflantzer worked for so many tour companies from 2012 to 2017 that he couldn't remember them all. RR 9:1503. To suggest that he would have maintained employment at NYPS for six years or more is pure fantasy in light of his history.
- Pflantzer worked approximately 8 weeks for NYPS, and the General Counsel is asking for six years of backpay to be issued based on what he earned during a high season for a handful of weeks.
- Pflantzer admitted that for the six weeks from January 1 to February 12, 2012, he did not perform one single tour for NYPS, yet the General Counsel seeks a backpay award for those weeks in every calendar year from 2013 to 2017. Those amounts should be eliminated from any backpay award.
- Mr. Pflantzer testified repeatedly that the year of the Groupon was 2013. His tax returns show that it was 2012, and that he elected to stop marketing his tours in 2013 because it was not profitable.
- Mr. Pflantzer cheats on his taxes. Every year. And he files sworn tax returns that are false. (Didn't report tips, Didn't report income from Uncle Sams RR 2:159-60)

- Pflantzer said he would never work for a company that bounced paychecks. Evidence showed that checks frequently bounced at NYPS. This defeats any claim for backpay after the first few months of 2012.
- There is no evidence to support his interim earnings. Couldn't tell how much he worked (or earned) at Uncle Sams in 2015, 2016, 2017, and 2018. RR 9:1433-35. If he could not quantify those numbers at the hearing, then there is no credibility to what he told Ms. Kurtzelben, and the Tribunal cannot award any backpay for those years, because his unreported earnings could have exceeded even Edwin Jorge's hypothetical pay during those periods.
- There were at least six versions of his backpay calculation. Some of the changes were to add more recent information, but most completely changed the amounts for 2012, 2013, and 2014. *Compare* R. Ex. 11 (final version), *with* R. Ex. 17 (lower gross backpay, lower interim earnings), *with* R. Ex. 18 (different tips calculation), *with* R. Ex. 19 (much higher gross backpay, much higher interim earnings).
- From October 2014 to present, Ms. Kurtzelben was "guessing" how many hours Edwin Jorge would have worked, so is "guessing" as to Mr. Pflantzer's backpay. RR 2:139.

3. The most important fact adduced at the hearing is that there is no basis for tips to be included in any award, and that the "moonlighting" amount of \$335 per week is fantasy. Using Respondents calculator, the Tribunal can remove those two items, and then adjust the total for Mr. Pflantzer's lack of mitigation until mid-2014, unknown interim

earnings from Uncle Sam's, and the fact that he only worked 71% of Mr. Jorge's hours during the period Pflantzer worked at NYPS.

### **ARGUMENT**

#### **PFLANTZER'S INCONSISTENCIES, FALSE TESTIMONY, AND FALSE SWORN TAX RETURNS**

4. The Tribunal has more than enough evidence to reach a determination that it should not believe any of Mr. Pflantzer's testimony. Examples of Mr. Pflantzer's deceptions:

- Did not report all of his income from Uncle Sam's on his sworn tax returns for in 2015, 2016, and 2017. RR 2:159-60; RR 9:1433-35; RR 9:1472.
- Never reported tips on seven sworn Federal and seven sworn State tax returns
- Contradictory testimony regarding tips
- Contradictory testimony about whether he worked for NY See Tours in 2011. His 2011 tax return says he did not. At one point, he testified that he did not. His tax returns from 2012 to present suggest he could not possibly have generated moonlighting income while also working full time for NYPS because he has never achieved that level of income.
- He told the Compliance Officer he earned a net profit of \$335 with one tour every week while working full time for NYPS, but he never earned that amount at any time in the 8 years for which we have data.
- After testifying that he worked full time for City Sights from 2010 through 2011, and only resigned from that job when he was employed

by NYPS, he was caught in another lie when it was revealed that he received unemployment insurance payments during 2011. RR 10:1610-11.

- He did not mention that he worked for Maxim (and he didn't tell Ms. Kurtzelben) until he was confronted with his w-2s that he did not expect to be in the hearing. RR 9:1453.

#### **PFLANTZER'S FAILURE TO MITIGATE DAMAGES UNTIL 2014**

5. Mr. Pflantzer did not seek or obtain new employment from the time he left New York Party Shuttle in February of 2012 until mid-2014 when he began working at Go New York Tours. RR 9:1417-18. During that time, he elected to try to build up his own business, NY See Tours, instead of seeking full employment. *Id.* The Fourth Amended Compliance Specification shows no interim earnings from the first quarter of 2013 through the end of the second quarter of 2014. Through those six quarters, there is no evidence that Mr. Pflantzer tried to work other than in the alleged “year of the Groupon” in building his own business. Mr. Pflantzer testified that the first job he got was Go NY Tours in mid-2014. RR 10:1612. Because NYPS is not responsible for his decision not to work at any of the 20+ other tour companies in NYC during that period, NYPS is not liable for any backpay during that period.<sup>1</sup>

#### **NO EVIDENCE OF MOONLIGHTING INCOME**

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<sup>1</sup> Interestingly, in Respondents' Backpay Calculation, the only period in which Mr. Pflantzer would earn backpay is during this 2013-2014 period when he did not seek other employment. In every other time period, he was able to earn more money in other jobs than Edwin Jorge did at NYPS. Respondents prepared their Backpay Calculator using Ms. Kurtzelben's numbers except for tips and moonlighting. It does not take into account whether Mr. Pflantzer was mitigating his damages in any period. Therefore, if the Tribunal believes he did not mitigate damages during that 2013-2014 period, then Mr. Pflantzer should not be awarded backpay for those quarters.

6. The Government's expert witness, Rachel Kurtzelben, testified that Mr. Pflantzer would have earned \$335 per week in "moonlighting" income throughout his employment with NYPS. Therefore, she deducted that amount from each week of his interim earnings throughout the backpay period – without any regard for whether he was actually conducting tours for NY See Tours during each period.

7. As discussed above, Mr. Pflantzer's multiple contradictions in his testimony establish his lack of credibility. The issue of moonlighting is one of the strongest examples where his lack of honesty is made clear. It is also the most critical issue in this proceeding. The establishment of an honest and accurate reference point must be supported with at least a few morsels of facts. Without a reasonable and reliable data point, a six-year back pay calculation suffers immeasurable distortion. The NLRB elected to structure their determination of potential back pay on the hearsay of the complainant. The Compliance Officer elected not to analyze or verify the moonlighting claim (or gratuities). Although surrounded in evidence that disproved the moonlighting claim, the Region just turned a blind eye. If they had reviewed Mr. Pflantzer's tax returns, bank statements, and business records, they could not possibly have accepted the erroneous assertion that he would have earned \$335 every Saturday while working full time at NYPS.

8. He told Ms. Kurtzelben that he earned \$335 per week in net profit from NY See Tours while working for NYPS in 2011. That was the single most important fact she included in her calculations for a six-year period. Even if it were true that he had earned that amount, relying on it and including it in every month of every low season for five years would have been unreasonable. There was, at most, a six-week history of those earnings (according to what he told her). But we know he never earned those amounts – especially

while also working for another employer. In not one single period from February of 2012 through 2018 did he earn that amount while also working even a part-time job. To the contrary, he testified that when he was working full time for other operators, he did not run regular tours for NY See Tours. He even testified at the hearing that he was not earning those amounts in the few weeks he worked at NYPS.

9. Mr. Pflantzer made clear that he did not conduct NY See Tours for moonlighting income in 2011. He testified:

Q You also testified under oath that in 2011 you operated bus tours for NY See Tours; is that true? Or was that -- maybe you were misremembering and it didn't start till 2012.

A I can't remember if I was working for you and CitySights. I don't remember operating bus tours for NY See Tours.

Q Same answer for walking tours for NY See Tours?

A That's correct.

Q I think we established that the first tours you did as NY See Tours were bus tours, not walking tours, right?

A That's correct.

Q Okay. So there were no NY See Tours in 2011.

10. That testimony eviscerates any claim for moonlighting amounts to be deducted from Mr. Pflantzer's interim earnings. The fact that he never operated bus or walking tours for NY See Tours during his employment at NYPS means that there is no basis for the moonlighting claim. The General Counsel refused to allow Ms. Kurtzelben to be recalled to clarify this point. They could have had her testify in rebuttal, but they did not. As a result, the Tribunal must assume that she would have confirmed that no moonlighting deduction should have been made because Mr. Pflantzer's sworn testimony was that he did not operate NY See Tours in 2011.

11. Ms. Kurtzelben should have known that the “moonlighting” theory was baseless. When she looked at Mr. Pflantzer’s *actual* earnings from his business in all of 2013 and the first half of 2014, Mr. Pflantzer’s total earnings from his business were less than the “moonlighting” amount she calculated – even with alleged tips included! That’s why her Interim Earnings numbers are zero for that period. That one fact completely disproves the moonlighting theory, so \$335 per week must be added back to the Interim Earnings column for every week in the backpay period. In some years, Mr. Pflantzer’s Schedule C on his tax return shows that his business actually lost money for the year. Ms. Kurtzelben and the General Counsel’s office should have known immediately that the moonlighting theory was misguided.

12. \$335 per week, for 52 weeks, is \$17,420. The *only year* in which the total revenues for NY See Tours exceeded that amount was 2012, and that is a year when he did not work any other jobs. There is no evidence to support Ms. Kurtzelben’s theory that Mr. Pflantzer would have moonlighted at NY See Tours to the extent of \$335 per week. Thus, that amount has to be added to his Interim earnings for each week of the backpay period. There is no evidence that he ever earned that much money while working full time at a tour company.

13. Respondents’ Exhibit 18 further highlights the falsity of the General Counsel’s latest backpay calculation. In that spreadsheet, the General Counsel reported to Respondent NYPS that Mr. Pflantzer earned significant backpay throughout the first half of 2013. Respondents’ Exhibit 19 also shows Interim Earnings in 2013. Where did that backpay go? The answer is it was massaged out of the calculation by the Compliance Officers. The bottom line is that Mr. Pflantzer is owed very little backpay, if any.

14. More changes were made to the calculations over time. Comparing Respondents’ Exhibit 11 with Exhibit 17 show that as late as 2017, the General Counsel’s office was changing the amount of Gross Backpay and the amount of Interim Earnings for virtually every period in the backpay period—including for 2012 and 2013. There was no

explanation from Ms. Kurtzelben at the Hearing of how or why the amounts Mr. Jorge earned in 2012 and 2013, or the amounts Mr. Pflantzer earned in those years, changed significantly on the last three iterations of the backpay calculation. Those changes are significant because, without explanation, they call into question the credibility of the version of the calculations used at the Hearing (the Fourth Amended). Either the Fourth Amended Compliance Specification misrepresented Pflantzer's Interim Earnings for the years 2012-2017, or the Third Amended one did. Respondents posit that the Tribunal has no way to know, and thus cannot award backpay on the basis of the General Counsel's backpay calculation.

#### **CONTRADICTIONARY EVIDENCE REGARDING GRATUITIES**

15. Exhibit B to the Fourth Amended Compliance Specification purports to describe the tips that would have been earned by Mr. Pflantzer. There are multiple problems with this document. First, the amount of the tips and the number of hours per tour are based solely on what Mr. Pflantzer told the compliance officer. RR 2:135-36. Mr. Pflantzer gave her ranges, and she arbitrarily took the midpoint of each range, without regard to the actual average tour duration or average of tips per tour. Pflantzer told her that he received between \$25 and \$50 per tour in tips at NYPS. So for purposes of the backpay calculation, she used the midpoint of \$35 per tour. However, if Mr. Pflantzer received \$25 on almost every tour, and got \$50 on one tour per year, then her number is grossly inflated. The Tribunal has no way of knowing the real amount. This is one reason the Tribunal should exclude tips from the analysis.

16. There is zero documentary evidence to support those numbers, and Mr. Pflantzer's tax returns, which show no tips during a seven-year period, contradict it. That means Exhibit B has no credibility. Mr. Pflantzer signed his tax returns under oath, affirmatively representing that he did not earn any tips in 2011 at NYPS. He made similar

sworn statements for his returns during the backpay period. This is the second reason that tips should be completely excluded from any backpay award – Mr. Pflantzer is equitably estopped from claiming he earned tips that he did not report on his tax return.

17. Near the end of the hearing, Mr. Pflantzer admitted that tips were really “a wash” and that he netted an average of \$30 per tour at NYPS and \$30 per tour in his Interim Earnings. That is the third reason tips should be excluded from any award.

18. To calculate backpay properly, Pflantzer’s weekly interim earnings must be increased by \$40 per tour for the tips he gave his NY See Tours guides. That was not him sharing tips... he testified he paid them that out of his pocket (which is a business expense) and then he kept the \$45 on average he earned in tips. RR 9:1438-39 (“A: No. There was no deal. That’s what I gave them. Q: That was your election? A: Correct.”). The \$40 was thus Pflantzer’s earnings, and he chose to give it to his drivers as a gift. NYPS should not be penalized for that, otherwise, he could have given his drivers \$300 per day and not had any interim earnings.

19. Respondents’ Exhibit 18, which was provided to NYPS by the General Counsel’s Office as the then-current backpay calculation, shows on page 4, in section 7, that Mr. Pflantzer originally reported much higher tip numbers for his NY See Tours business. On that page, it indicates he was earning \$75 to \$150 per tour at his business and \$50 to \$125 per tour at NYPS. R. Exh. 18, at p. 4. A far cry from what he testified to at the Hearing. Yet more evidence of Mr. Pflantzer’s lack of candor and credibility.

20. According to Respondents’ 18, there should have been a *reduction* in backpay for the tips Mr. Pflantzer was able to earn running his own tours. The amount of

the reduction would be \$25 per tour (the spread between \$75 and \$50 in the low season and \$150 and \$125 in the high season).<sup>2</sup>

21. In the alternative, if the Tribunal believes Mr. Pflantzer should be awarded backpay for tips, it at least needs to correct the amount of tips Mr. Pflantzer would have received. The “5.5 hours per tour” that is used to calculate the number of tours on Exhibit B to the Fourth Amended Compliance Specification is inaccurate. The testimony from Ron White, Fred Moskowitz, and Tom Schmidt was that the NY See It All Tour at NYPS was advertised as 6 hours, and tour guides had to report for work 15 minutes early, and almost never returned on time. That minor adjustment (changing 5.5 to 6.5) reduces the amount of tips calculated on Exhibit B by \$7,587.30, so it is a significant error in the calculation.<sup>3</sup>

#### **EDWIN JORGE AS A COMPARATOR EMPLOYEE**

22. There was overwhelming evidence that Edwin Jorge is not a valid comparator employee with Fred Pflantzer. Tom Schmidt, Fred Moskowitz, and former employee Ronnie White all testified to the numerous reasons that Edwin Jorge got more shifts than Mr. Pflantzer:

- He was bilingual.
- He conducted private tours.
- He was willing to work on the busiest day of the week – Saturday.

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<sup>2</sup> There is no evidence in the Record to support how many tours Mr. Pflantzer performed as Interim Earnings, and no consistent information on the average length of tours completed or his hourly rates, from which the number of tours could be calculated. This is fatal to the Government’s claims because there is no basis for the Interim Earnings numbers.

<sup>3</sup> The Total Tips shown on Exhibit B are \$49,317.48, which is 1409.07 tours at \$35 each. If you change the tour duration to an average of 6.5 hours, it reduces the number of tours to 1192.29, and yields a tips number of \$41,730.18.

- He was a long-time, reliable employee.
- He consistently got stellar reviews on TripAdvisor.

23. The government provided zero evidence to support the appropriateness of Mr. Jorge as the comparator employee. Even Ms. Kurtzelben's testimony is that her only basis is that during a limited 8-week window in late 2012, they worked similar number of hours. RR 2:309-11. As Respondent's Exhibit 10 shows, their hours were not similar during the period that they both worked at NYPS. *See also* Gov't Exh. 2(a) and 2(b) (showing that Jorge worked from January 1 through February 12, but Mr. Pflantzer did not work at all during that period because of lack of seniority). The Tribunal should disregard Ms. Kurtzelben's backpay calculation altogether as a result. At a minimum, the Tribunal should accept that Mr. Pflantzer worked approximately 71% of the hours that Mr. Jorge did during the time they were both at NYPS, and apply that reduction to the "Gross Backpay."<sup>4</sup>

24. Additionally, from October 2014 to 2018, the Gross Backpay calculation offered by General Counsel is based on pure speculation and does not take into account the decline in business and closure of NYPS. Ms. Kurtzelben testified that she merely used Edwin Jorge's actual hours from October 2013 to September 2014, and pasted them in to the entire period of October 2014 through 2018.

Q BY MS. LANCIA: For the period after October 20, 2014, how did you determine the hours that Fred Pflantzer would have worked based on the comparator employee's, Edwin Jorge's hours?

A So I took the last full year of payroll data that we had, which is from October 2013 to October 2014, and then I just repeated those hours for each subsequent year of the backpay period so 2015, 2016, 2017, 2018, and so on.

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<sup>4</sup> This is already done on Respondents' Backpay Calculator Excel Sheet, and the Tribunal can edit the 71% amount on the second tab, called "Inputs."

And I did that, because I want to reflect the whole year to reflect the seasonal shifts and hours. And it was the most recent data that we had.

RR 2:142-143.

25. That means that entire section of the backpay calculation is based on impermissible speculation. Ms. Kurtzelben admitted that the compliance manual instructs her office not to make guesses like that. To wit:

Q And why is a concern that Jorge had more data over the back pay period out of the payroll records you received important?

A Because -- well, I reviewed the compliance manual first, regarding the specific calculation method and it said specifically that it's important for the comparator employee to have data spanning the entire back pay period and the reason is that you don't want to project. If you're comparator stops working for some reason, part way through the back pay period, ***then you're guessing as to what that comparator would have earned for the rest of the back pay period.***

RR 2:139 (emphasis added). The portion of the backpay calculation that runs from October 2014 to present should be disregarded by the Tribunal because it is without any basis and is the product of Ms. Kurtzelben guessing.

#### **UNDERLYING INTERIM EARNINGS CALCULATION IS FLAWED FOR A SEASONAL BUSINESS**

26. The NLRB Compliance Officer calculated Mr. Pflantzer's Interim Earnings by taking his annual earnings, subtracting the moonlighting amount, and then dividing by the number of weeks in the year. That analysis ignores seasonality. During the periods when Mr. Pflantzer's Interim Earnings exceed his Gross Backpay, the delta between those two numbers is greater than during the periods in which the Gross Backpay exceeds the Interim Earnings. This artificially increases the amount of backpay owed to Mr. Pflantzer.

#### **RESPONDENTS ARE NOT A SINGLE EMPLOYER**

27. To determine whether several entities are a single employer within the meaning of the Act, the Board looks to four factors: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile Inc.*, 380 U.S. 255, 256, 85 S. Ct. 876, 13 L.Ed.2d 789 (1965) (per curiam); *NLRB v. DMR Corp.*, 699 F.2d 788, 790–91 (5th Cir. 1983). “However, no one of these factors is controlling, nor need all criteria be present. Single employer status ultimately depends on ‘all the circumstances of the case’ and is characterized as an absence of an ‘arm’s length relationship found among unintegrated companies.’ ” *DMR*, 699 F.2d at 791 (quoting *Local 627, Int’l Union of Operating Eng’rs v. NLRB*, 518 F.2d 1040, 1045–46 (D.C. Cir. 1975), *aff’d in part on this issue, rev’d in part sub nom. S. Prairie Constr.*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382). But, “the factors of common control over labor relations, common management, and interrelation of operations are more critical than the factor of common ownership” and “centralized control of labor relations is of particular importance.” *Oaktree Capital Mgmt., L.P. v. NLRB*, 452 Fed.Appx. 433, 438 (5th Cir. 2011) (per curiam) (quoting *Covanta Energy Corp.*, 356 N.L.R.B. 706, 726 (2011)).

28. The evidence in this case conclusively negated all four factors. No two Respondents have common ownership. *See* Gov’t Exhibit 44. The management of each of the entities is different, as testified to by Ronnie White, Fred Moskowitz, Larry Lockhart, and Tyree Cook. The same witnesses consistently testified that the operations of NYPS, DCPS, and OBLV were kept separate and were not integrated, with separate management of each. Certainly Party Shuttle Tours, LLC, which doesn’t have any operations, was not integrated with any of the other Respondents. Likewise, there was no centralized control of labor relations. Each company recruited, hired, trained, disciplined, and fired its own

employees with complete autonomy from the other companies. There was no evidence that any person affiliated with any of the Respondents other than NYPS had anything to do with Mr. Pflantzer's separation from the company.

29. There was no evidence to support any of the factors in the single employer doctrine. The General Counsel introduced financial transaction information showing that Respondents have loaned money back and forth among each other, but the only testimony about those transactions was that they were at arm's length and were booked on the various companies' financials. Every significant company in the world engages in similar transactions. Without more, those transactions do not show that the entities are a single employer.

#### **NYC GUIDED TOURS IS NOT NYPS'S ALTER EGO OR *GOLDEN STATE* SUCCESSOR**

30. When an employer is alleged to be an alter ego, the Board considers whether the entities in question are substantially identical, including the management, business purpose, operating equipment, customers, supervision, operation, work force, and common ownership or control. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Advance Electric*, 268 NLRB 1001, 1002 (1984).

31. NYCGT does not meet any of the *Crawford Door* criteria. The ownership, management, business plan, equipment, customers, work force, and operation were all different. NYPS had different ownership in that Mark D'Andrea was not a shareholder of NYCGT, and Fred Moskowitz was not a shareholder of NYPS. The management team at NYCGT was different. Yes, it employed Fred Moskowitz, but one employee does not create an *alter ego*. With regard to equipment and assets, NYCGT has never owned any physical assets, whereas the core of NYPS's business was the fleet of buses it owned. For

a few months, NYCGT leased the NYPS-owned buses to fulfil customer obligations of NYPS, for a fee, but that was a short-term project that was not the core of NYCGT's business. NYCGT maintained its own bank accounts, financials, tax returns, payroll systems, and corporate documents.

32. NYPS generated most of its sales from concierges, tour operators, online resellers like Viator, and other third-party sellers. It operated a transportation service between New Jersey and Manhattan for tours sold by New Jersey hotels. It operated fall foliage tours and shopping tours. It put its customers on private boat cruises. NYCGT did none of those things. Messrs. Moskowitz and Schmidt testified at length to the differences in the staffing, management, business plan, organization, equipment, and operations of the two companies. The mere fact that NYCGT continued to operate, and NYPS closed down, demonstrates that the two entities were not alter egos, by definition.

33. An *alter ego* relationship is established when there is a "mere technical change in the structure or identity of the [old] employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *N.L.R.B. v. Omnitest Inspection Servs., Inc.*, 937 F.2d 112, 118 (3d Cir. 1991); *Howard Johnson Co.*, 417 U.S. 249, 259 n. 5, 94 S. Ct. 2236, 2242 n. 5, 41 L.Ed.2d 46 (1974). The determination of alter ego status depends on whether there has been "a bona fide discontinuance and a true change [in] ownership" of the old employer, or "a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106, 62 S.Ct. 452, 456, 86 L.Ed. 718 (1942). For an alter ego relationship to exist, a purpose to avoid the old employer's labor obligations under a collective bargaining agreement or under the Act must underlie the formation of the new employer. *N.L.R.B. v. Omnitest*

*Inspection Servs., Inc.*, 937 F.2d 112, 118 (3d Cir. 1991); *Fugazy Continental Corp.*, 265 NLRB 1301, 1301-02 (1982), *enforced*, 725 F.2d 1416 (D.C.Cir.1984). No such evidence was adduced in this case. Fred Moskowitz gave a list of specific business reasons that NYCGT was created. That allegation was never made in the Compliance Specification, and no evidence was introduced to support it. There is no basis for asserting that NYCGT was set up to avoid NYPS's liability, particularly when NYCGT was started and was operated simultaneously with NYPS for approximately a year before NYPS closed down.

34. Likewise, NYCGT is not a *Golden State* successor to NYPS. An employer who acquires and operates a business in basically unchanged form can be held jointly and severally liable for un-remedied unfair labor practices of its predecessor if the new employer had notice of those unfair labor practices. *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168 (1973). To be a successor, a company must have acquired the other company, or at least its assets. There is no evidence of any such transaction here. NYCGT was set up by Fred Moskowitz as part of a new business plan to make the business more profitable, as he testified.

35. Not only was there no *Golden State* acquisition, but NYCGT was not operated in "basically unchanged form." It did not own buses or have physical assets. It did not employ managers other than the President. It did not use offer the same list of tours, did not use the same vendors, did not use private boat cruises, did not use the same sales channels, nor did it utilize the same staff. It did not provide transportation services. It did not operate buses out of a garage in Long Island, with a manager (Ronnie White) who rode with the buses to the loading location in Times Square. It did not use the same loading location at all. It did not use the same offices, did not have the same shareholders,

and did not conduct business with any of NYPS's clients or customers. Accordingly, it cannot be said that NYCGT was merely the continuation of NYPS's business "in basically unchanged form," particularly when NYCGT was started and was operated simultaneously with NYPS for approximately a year before NYPS closed down.

#### **NO ENTITLEMENT TO REINSTATEMENT OR FRONT PAY**

36. Any backpay obligation owed to Mr. Pflantzer ended when Respondent New York Party Shuttle, LLC, ceased conducting sightseeing tours, which was on April 30, 2015. NYPS closed down its business in 2015. There is no job for Mr. Pflantzer to be reinstated to. Likewise, since 2017, by their own admission, Mr. Pflantzer has consistently earned more working for other tour companies than he could have at NYPS.

#### **EXCESS TAX LIABILITY**

37. A critical component of the Excess Tax Liability calculations omitted from the General Counsel's Compliance Specification is the amount of unreported income Mr. Pflantzer has in tips and pay from Uncle Sam's Tours. The Tribunal cannot rely on the Excess Tax Liability calculations, even if it awards the amounts requested by the Government, because they do not take into account the increased income Mr. Pflantzer should have reported. Without those calculations, the excess tax liability calculations are fatally flawed, and no excess tax liability should be awarded.

38. Further, the Tribunal may determine the amount of backpay owed, using the calculator provided by Respondents. Because the Parties do not know which amount will be awarded, if any, they cannot determine the amount of any excess tax liability. The General Counsel did not provide any evidence to support an excess tax liability award unless the Tribunal accepts their damages calculation. Thus, no amount may be awarded for excess tax liability. Further, given the false tax returns repeatedly filed by Mr.

Pflantzer, the Tribunal could not have any confidence that any excess tax award would be reported and/or paid to the IRS anyway.

**THERE IS NO JURISDICTION OVER RESPONDENTS**

39. The Board does not have jurisdiction over OnBoard Las Vegas Tours, LLC, Washington DC Party Shuttle, LLC, Party Shuttle Tours, LLC, or NYC Guided Tours, LLC, because there is no evidence that any of them conducted more than \$500,000.00 in annual sales and no evidence that any of them purchased or sold more than \$5000.00 in goods or services outside of their home states at any time. The General Counsel did not introduce any evidence to establish jurisdiction over those parties. In their summary judgment response in this case, they stated they would provide significant evidence to support jurisdiction. However, they provided none. In fact, there is no information in the record from which the Tribunal can determine any sales or purchases by any of the companies, including New York Party Shuttle, LLC, either individually or in the aggregate. This case should, therefore, be dismissed.

**NYC GUIDED TOURS, LLC, DID NOT EXIST UNTIL LATE IN 2014.**

40. NYC Guided Tours, LLC, cannot be part of a “single business enterprise” with the other Respondents on the facts of this case because it did not exist until October 22, 2014, long after Mr. Pflantzer had ended his working relationship with NYPS.

**ONBOARD LAS VEGAS TOURS, LLC, IS A SEPARATE BUSINESS**

41. OnBoard Las Vegas Tours, LLC, cannot be part of a single business enterprise because it did not share any common officers or employees with the other respondents, did not have the same owners, and had a completely separate business than

the other respondents. It had its own President, managing director, and employees. It had its own policies and procedures. It had no impact on hiring and firing decisions at NYPS.

**PARTY SHUTTE TOURS, LLC, IS A SEPARATE COMPANY**

42. Party Shuttle Tours, LLC, cannot be part of a single business enterprise with the other respondents because it has never conducted a sightseeing tour, has different ownership than the other Respondents, it has never had an employee, and it has never made any employment decisions nor had any employment policies. Tom Schmidt testified to all of these facts at the Hearing, and there was no contradictory testimony from any witness specific to Party Shuttle Tours, LLC.

**WASHINGTON DC PARTY SHUTTLE, LLC, IS A SEPARATE COMPANY**

43. Washington DC Party Shuttle, LLC, cannot be part of a single business enterprise because its ownership makeup is different than the other Respondents, it has separate managers and employees that do not work for the other Respondents, it maintains separate employment policies and procedures from the other Respondents, and, to the extent it engages in financial transactions with other Respondents, they are arms-length transactions documented on the books of the companies. Larry Lockhart, Tyree Cook, Fred Moskowitz, Ronnie White, and Tom Schmidt all confirmed these facts in their testimony.

**III. Prayer**

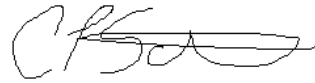
WHEREFORE, Respondents respectfully pray that the Tribunal award \$0 in backpay to Mr. Pflantzer, and decline to order him to be reinstated because NYPS is no longer operating. In the alternative, Respondents request that the Tribunal award \$0 backpay for 2012 through the second quarter of 2014 for lack of mitigation, award \$0 for

tips, award \$0 for moonlighting, and then calculate remaining backpay, if any, using Respondents' backpay calculator based on the evidence.

September 17, 2018

Respectfully submitted,

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SHUTTLE, LLC, NYC GUIDED  
TOURS, LLC, PARTY SHUTTLE  
TOURS, LLC, AND ONBOARD LAS  
VEGAS TOURS, LLC.**

### **DECLARATION OF SERVICE**

I certify and declare, under penalty of perjury, that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 17th day of September, 2018, in the manner indicated below.

John J. Walsh, Jr., Regional Director  
National Labor Relations Board, Region 2  
26 Federal Plaza, Room 3  
New York, NY 10278-0104


***By Electronic Mail***

Nicole Lancia  
Eric Brooks  
Counsel for National Labor Relations Board

***By Electronic Mail***

Fred Pflantzer  
Real Party In Interest

***By Electronic Mail***

A handwritten signature in black ink, appearing to read 'C. Thomas Schmidt', written over a horizontal line.

C. Thomas Schmidt